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June 3, 2015

BY ECF

Hon. Naomi Reice Buchwald
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street, Room 21A
New York, NY 10007-1312

**Ironshore Specialty Insurance Company
v. Cedar Grove Composting, Inc.
Case No.: 15-CV-975 (NRB)**

Dear Judge Buchwald:

I represent defendant Cedar Grove Composting, Inc. ("Cedar Grove").

On June 2, 2015, the parties received the enclosed Order from the United States District Court for the Western District of Washington granting Cedar Grove's motion invoking the first-to-file rule. The court found that the Western District of Washington action pending before Judge Jones and this action pending before Your Honor "are indisputedly between the same parties" and that there was "not much of a dispute" regarding "whether the two suits involve the same issues." See Order at 6:13-15. The court concluded:

Resolving these lawsuits in two different forums is at best a waste of the parties' and the judiciary's resources; it is at worst an invitation to inconsistent rulings from two different courts. The first-to-file rule was designed to prevent situations like these. The court exercises its discretion to invoke it here. The suit that Cedar Grove filed [in Washington] is the first-filed action.

Order at 7:3-7.

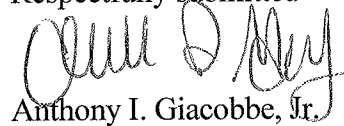
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In the Order, Judge Jones ordered the parties to “ensure” that notice of the Order is provided to this Court, recognizing that “[c]itation of this Order to the New York Court” and this District’s “bright-line rule” “will perhaps be sufficient to bring the New York action to a conclusion.” Order at 7:16-25.

Cedar Grove intends to request a pre-motion conference with the Court in light of Judge Jones’ Order; however, in an attempt to avoid additional fees and the waste of judicial resources, counsel for the parties are conferring about whether this action can be dismissed, and hope to conclude those discussions by Friday.

Respectfully submitted

A handwritten signature in dark ink, appearing to read "Anthony I. Giacobbe, Jr.", is written over the typed name.

Anthony I. Giacobbe, Jr.
Attorney for Defendant

AIG:asl
Enclosure

cc: Adam I. Stein, Esq.
Attorney for Plaintiff

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CEDAR GROVE COMPOSTING,
INCORPORATED,

Plaintiff,

v.

IRONSHORE SPECIALTY INSURANCE
COMPANY,

Defendant.

CASE NO. C14-1443RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on Defendant's motion to dismiss, Plaintiff's motion to file supplemental briefing, and Plaintiff's motion invoking the "first-to-file rule." Defendant requested oral argument as to its motion to dismiss; no party requested oral argument as to any other motion. The court finds oral argument unnecessary. For the reasons stated below, the court DENIES the motion to dismiss (Dkt. # 11), directs the clerk to TERMINATE the motion for supplemental briefing (Dkt. # 27) because it is moot, and GRANTS Plaintiff's motion invoking the first-to-file rule (Dkt. # 35) by ruling that this suit, not the suit between these parties currently pending in the Southern District of New York, is the first-filed action. No later than June 12, 2015, Plaintiff shall file an amended complaint in accordance with this order. After Defendant has reviewed that amended complaint, and no later than June 25, 2015, the parties shall meet and confer and file a joint statement as to the status of the New York action.

II. DISCUSSION

1 Plaintiff Cedar Grove Composting Incorporated operates two organic waste
2 composting facilities in Western Washington. It was named as a defendant four times in
3 2013 in suits claiming various injuries as a result of odors emanating from those
4 facilities. Cedar Grove turned to its insurer, Defendant Ironshore Specialty Insurance
5 Company. It has not been happy with the results. In its complaint, it contends that
6 Ironshore defended it only after reserving its right to deny coverage on an improper basis,
7 that Ironshore forced it to expend hundreds of thousands of dollars to fund its own
8 defense, and that Ironshore improperly interfered in the defense of the lawsuits.

9 Because the court considers Cedar Grove's allegations of wrongdoing on
10 Ironshore's motion to dismiss, it must accept the allegations of Cedar Grove's complaint
11 as true and ignore evidence or assertions to the contrary. That mandate is fatal to
12 Ironshore's motion to dismiss, a conclusion that the court will explain in more detail later
13 in this order. For now, the court summarily rules that Cedar Grove's complaint is
14 adequate to state claims against Ironshore for breach of an insurance policy it issued to
15 Cedar Grove, and for bad faith and a variety of other extra-contractual causes of action,
16 including violations of Washington's Consumer Protection Act ("CPA") and Insurance
17 Fair Conduct Act ("IFCA").

18 **A. The First-to-File Rule Applies Here; This Lawsuit, Not the Suit Ironshore** 19 **Filed in New York, is the First-Filed Action.**

20 Less remarkable than Ironshore's motion to dismiss is the parties' litigation
21 conduct since Ironshore filed that motion. One of Ironshore's principal assertions in that
22 motion was that there was no live controversy over the policy Cedar Grove identified in
23 the complaint because Ironshore had made payments exhausting that policy's \$2 million
24 limit. Among Cedar Grove's responses to the motion to dismiss was that the \$2 million
25 limit applied only to the primary insurance policy, and that an excess insurance policy
26 from Ironshore provided up to \$10 million in additional coverage.

1 Ironshore, although it was unquestionably aware of the excess policy it had issued,
2 did not mention that policy in its motion to dismiss. In its reply brief, it explained that it
3 believed it had no obligation to mention the excess policy because Cedar Grove had not
4 identified that policy in its complaint. Moreover, Ironshore announced in that reply brief
5 that it had filed a separate lawsuit regarding its obligations under the excess policy.

6 Ironshore filed its new lawsuit in the Supreme Court of New York on January 9,
7 2015, after it filed its motion to dismiss here, but before Cedar Grove opposed it. Cedar
8 Grove has since removed that suit to the United States District Court for the Southern
9 District of New York.

10 The New York action overlaps substantially with this one. That is no surprise,
11 because the Ironshore excess policy defines its coverage largely by reference to the
12 Ironshore primary policy. The New York complaint requests that the court declare that
13 five clauses *from the primary policy* operate to bar or exclude coverage under the excess
14 policy. That too, is no surprise, because Ironshore has taken the position, at least since its
15 February 2013 reservation of rights letter, that it may deny coverage under both the
16 excess and primary policies because of coverage definitions and exclusions contained
17 solely in the primary policy.

18 Cedar Grove did not know that Ironshore had filed the New York action until after
19 it opposed the motion to dismiss. It then filed a motion to supplement its briefing on the
20 motion to dismiss to address the New York action. It then mooted that motion by filing a
21 motion requesting that the court apply the “first-to-file rule” and deem this action, not the
22 New York action, to be the first-filed suit for purposes of that rule.

23 The court is at a loss to understand the choices that have put the parties in this
24 situation: a suit pending here regarding the primary policy and a suit pending in New
25 York regarding the excess policy. Those choices began with Cedar Grove’s decision to
26 exclude the excess policy from the complaint in this action. That exclusion appears
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1 deliberate. Cedar Grove named only the primary policy, did not assert the existence of
2 the excess policy, and left no outsider with any basis to conclude that there was more
3 than one policy in controversy. Cedar Grove says that its complaint “did not specifically
4 refer to the secondary layer of coverage provided by Ironshore because it was not clear
5 whether Ironshore had or would pay monies sufficient to exhaust the primary layer at the
6 time Cedar Grove filed the complaint on August 20, 2014.” Pltf.’s Opp’n (Dkt. # 20) at
7 10 n.5. That explanation is unpersuasive. In a letter sent, perhaps coincidentally, on the
8 same day that Cedar Grove sued, Ironshore agreed to make payments bringing its total
9 expenditures on Cedar Grove’s defense to more than \$2.6 million. Duluc Decl. (Dkt.
10 # 25), Ex. B. Even if Cedar Grove was unaware of that agreement before suing, it
11 certainly knew that it was asking for reimbursements that exceeded the limits of the
12 primary policy. In other words, it knew that the excess policy was at least potentially at
13 issue, and said nothing at all about it in its complaint.

14 Ironshore’s conduct is no easier to understand. Like Cedar Grove, it knew that the
15 excess policy was at issue, and yet filed a motion to dismiss in which it claimed that the
16 dispute between the parties was moot because it had exhausted the limits of the primary
17 policy. It did so without mentioning the excess policy or Ironshore’s plan to sue over that
18 policy in New York. When Cedar Grove received the motion to dismiss, it had 21 days
19 in which it could have amended its complaint, without seeking leave of court, to add
20 claims involving the excess policy. Fed. R. Civ. P. 15(a)(1)(B). But it did not, instead
21 informing the court in opposition to the motion to dismiss that it was “more than willing
22 to amend its Complaint” to “the extent that the Court deems it prudent” Pltf.’s
23 Opp’n (Dkt. # 20) at 10 n.5. Why did Cedar Grove itself not deem an amendment
24 prudent? And why, in the more than six months since Cedar Grove discovered that
25 Ironshore took the position that the excess policy was not at issue in this lawsuit, has
26 Cedar Grove taken no step to amend its complaint?

1 The final explanation for the predicament before the court is Ironshore's reliance
2 on two clauses that appear only in the excess policy:

3 In the event that the insured and we have any dispute concerning or relating
4 to this policy, including its formation, coverage provided hereunder, or the
5 meaning, interpretation or operation of any term, condition, definition or
6 provision of this policy resulting in litigation, arbitration or other form of
7 dispute resolution, the insured agrees with us that any such litigation shall
8 take place in the appropriate federal or state court located in New York,
9 New York

10

11 In the event that the insured and we have any dispute concerning or relating
12 to this policy including its formation, coverage provided hereunder, or the
13 meaning, interpretation or operation of any term, condition, definition or
14 provision of this policy resulting in litigation, arbitration or other form of
15 dispute resolution, the insured agrees with us that the internal laws of the
16 State of New York shall apply without giving effect to any conflicts or
17 choice of law principles.

18 Ironshore relies on these clauses not only to explain its choice to file the New York
19 action, but also as a possible explanation for Cedar Grove's apparently deliberate choice
20 not to mention the excess policy in its complaint. Even if the forum-selection clause is
21 valid,¹ no one explains why anyone would prefer the situation the parties have created for
22 themselves: one suit in Washington and one in New York. Even if the choice-of-law
23 clause is valid, *see n.1 supra*, Ironshore does not explain why it was necessary to sue in
24 New York to enforce it. Ironshore could have filed the claims at issue in the New York

25 ¹ Washington has, by statute, declared that no "insurance contract delivered or issued for delivery
26 in this state and covering subjects located . . . in this state" shall "depriv[e] the courts of this state
27 of the jurisdiction of action against the insurer" RCW 48.18.200(1)(b). The same statute
28 bars any clause "requiring [an insurance policy] to be construed according to the laws of any
other state or country" except in circumstances not relevant here. RCW 48.18.200(1)(a). The
statute declares clauses that violate it to be void. RCW 48.18.200(2). The court need not decide,
at this time, what impact this statute has on the excess policy. It notes, however, that the
Washington Supreme Court has declared that RCW 48.18.200(1)(b) "demonstrates the
legislature's intent to protect the right of policyholders to bring an original 'action against the
insurer' in the courts of this state." *Dep't of Transp. v. James River Ins. Co.*, 292 P.3d 118, 123
(Wash. 2013) (holding that binding arbitration agreements in insurance policies are void).
Ironshore has not seriously confronted either the statute or the Washington Supreme Court's
interpretation of it. Its contention that *Atl. Marine Constr. Co. v. United States Dist. Court*, 134
S. Ct. 568 (2013) prohibits states from invalidating some forum selection clauses finds no
support anywhere in that decision.

1 action (largely claims for declaratory judgment as to its obligations under the excess
2 policy) as counterclaims in this lawsuit. On the record before the court, the most likely
3 explanation for Ironshore's choice to file a second lawsuit is that it was either forum-
4 shopping or filing a second suit in a second forum solely the purpose of increasing the
5 burden on its insured.

6 The first-to-file rule saves the court from having to answer most of the questions
7 that the parties' conduct raises. That rule applies when two complaints involving the
8 same parties and issues are filed in two federal district courts. *Alltrade, Inc. v. Uniweld*
9 *Products, Inc.*, 946 F.2d 622, 625 (9th Cir. 1991). It is a discretionary doctrine, one that
10 permits the court overseeing the second-filed complaint to decline jurisdiction or the
11 court overseeing the first-filed complaint to enjoin the later-filed action. *Id.*; *Decker Coal*
12 *Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

13 The two lawsuits are undisputedly between the same parties, the only possible
14 dispute is whether the two suits involve the same issues. That is not much of a dispute, in
15 the court's view. As noted, Ironshore's suit asks the New York court to construe many
16 (perhaps all) of the clauses *from the primary policy* that are at issue in this lawsuit. That
17 it does so in the context of assessing Ironshore's liability under the excess policy is not
18 meaningful in deciding whether it makes sense to resolve these issues in two separate
19 lawsuits. Ironshore has invited two different courts to interpret the same clauses, thus
20 inviting inconsistent judgments. As the court has already stated, it will not grant
21 Ironshore's motion to dismiss, so Ironshore cannot avoid the first-to-file rule on that
22 basis. The only fact weighing in Ironshore's favor is Cedar Grove's apparently deliberate
23 exclusion of the excess policy from the complaint it originally filed and its inexplicable
24 refusal to amend that complaint sooner. But that is not dispositive, as "[a] number of
25 courts have held that the filing of a complaint triggers the first-filed rule, regardless of
26 whether the plaintiff later amends the complaint." *Barnes & Noble, Inc. v. LSI Corp.*,

1 823 F. Supp. 2d 980, 987 (N.D. Cal. 2011). The court will order Cedar Grove to file the
2 amended complaint it should have filed long ago.

3 Resolving these lawsuits in two different forums is at best a waste of the parties'
4 and the judiciary's resources; it is at worst an invitation to inconsistent rulings from two
5 different courts. The first-to-file rule was designed to prevent situations like these. The
6 court exercises its discretion to invoke it here. The suit that Cedar Grove filed is the first-
7 filed action.

8 What remains is for the court to fashion a remedy. Cedar Grove asks only that the
9 court rule that this suit was the first one filed. The court has done that much. In the
10 alternative, it asks the court to enjoin the New York action to the extent the court deems it
11 prudent. In the court's view, enjoining another court is rarely the prudent option. This is
12 not the rare case demanding a different conclusion, especially because Cedar Grove did
13 not affirmatively request an injunction. Instead, the court orders as follows:

- 14 1) No later than June 12, 2015, Cedar Grove shall file an amended complaint
15 stating its claims regarding the excess policy.
- 16 2) The parties shall ensure that the court overseeing the action in the Southern
17 District of New York receives notice of this order. As Cedar Grove points out,
18 that District's "bright-line rule" is that the "court before which the first-filed
19 action was brought determines which forum will hear the case." *MSK Ins.,*
20 *Ltd. v. Employers Reinsurance Corp.*, 212 F. Supp. 2d 266, 268 (S.D.N.Y.
21 2002) (Buchwald, J.) (internal footnote omitted); *see also Noble v. US Foods,*
22 *Inc.*, No. 14-cv-7743-RA, 2014 U.S. Dist. LEXIS 162643, at *8 (S.D.N.Y.
23 Nov. 19, 2014) (following same bright-line rule). Citation of this order to the
24 New York court will perhaps be sufficient to bring the New York action to a
25 conclusion. Regardless, this action will proceed. If additional relief from this
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1 court is necessary to address the New York proceeding, Cedar Grove will be
2 responsible for requesting that relief.

- 3 3) No later than June 25, 2015, but after Ironshore has had an opportunity to
4 review Cedar Grove's amended complaint, the parties shall file a joint
5 statement as to the status of the New York action.

6 **B. The Court Denies Ironshore's Motion to Dismiss.**

7 What remains is to explain the court's conclusions as to Ironshore's motion to
8 dismiss. That motion invokes Federal Rule of Civil Procedure 12(b)(6), which permits a
9 court to dismiss a complaint for failure to state a claim. Rule 12(b)(6) requires the court
10 to assume the truth of the complaint's factual allegations and credit all reasonable
11 inferences arising from those allegations. *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir.
12 2007). The plaintiff must marshal factual allegations that "state a claim to relief that is
13 plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568 (2007). If the
14 plaintiff succeeds, the complaint avoids dismissal if there is "any set of facts consistent
15 with the allegations in the complaint" that would entitle the plaintiff to relief. *Id.* at 563;
16 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("When there are well-pleaded factual
17 allegations, a court should assume their veracity and then determine whether they
18 plausibly give rise to an entitlement to relief."). The court typically cannot consider
19 evidence beyond the four corners of the complaint, although it may rely on a document to
20 which the complaint refers if the document is central to the party's claims and its
21 authenticity is not in question. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). The
22 court may also consider evidence subject to judicial notice. *United States v. Ritchie*, 342
23 F.3d 903, 908 (9th Cir. 2003).

24 As noted, one of Ironshore's principal contentions is that this suit is moot because
25 it has exhausted the primary policy by paying more than its limits to cover Cedar Grove's
26 defense costs. The court ignores that Ironshore has provided evidence outside the
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1 pleadings to prove its payments, which is impermissible in a Rule 12(b)(6) motion. It
2 also ignores Cedar Grove's evidence that Ironshore has yet to make at least some of the
3 payments it alleges it has made. Even if Ironshore had undisputedly paid the limits of the
4 primary policy, it would not make this dispute moot. For example, Cedar Grove insists
5 that by improperly forcing it to pay a deductible and by delaying or refusing to pay
6 certain defense costs, Ironshore forced it to spend its own money on its defense.
7 Ironshore cannot cure the damage arising from its delayed payments by paying defense
8 costs much later than its policy and Washington law required. As another example, if
9 Ironshore damaged Cedar Grove by interfering in the defense of the underlying lawsuits,
10 its later payments do not render that claim moot. Cedar Grove's complaint plausibly
11 alleges that Ironshore's interference caused it damage. No one should mistake this order
12 for a ruling on the merits of the parties' coverage dispute. But, accepting as true Cedar
13 Grove's allegations of wrongdoing (as the court must at this stage), this is not a moot
14 lawsuit.

15 Also unavailing is Ironshore's insistence that it cannot understand Cedar Grove's
16 complaint because it does not specifically identify the policy provisions it breached. That
17 is an unconvincing assertion; Ironshore's February 2013 reservation of rights letter
18 (which the complaint refers to and which the court deems incorporated by reference)
19 leaves little doubt that Ironshore is fully aware of what policy provisions are at issue. But
20 even if that were not the case, the remedy for Ironshore's alleged confusion would be, at
21 most, an order that Cedar Grove must amend its complaint. The court has just issued that
22 order.

23 Ironshore's attacks on Cedar Grove's individual causes of action and individual
24 requests for relief do not persuade the court. Many of them depend on Ironshore's
25 mistaken belief that payment of the primary policy limits (assuming it has made those
26 payments) moots this suit. Others depend on feigned or actual misunderstandings that
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1 Cedar Grove's amended complaint is likely to cure. Some do not merit individualized
2 discussion. The exception is Ironshore's attack on Cedar Grove's IFCA claim, which the
3 court now addresses.

4 **C. Cedar Grove Has Pleaded an IFCA Claim.**

5 Ironshore correctly points out that this court and others have held that an insured
6 cannot base an IFCA claim purely on a violation of Washington's insurance regulations.
7 *E.g., Seaway Props., LLC v. Fireman's Fund Ins. Co.*, 16 F. Supp. 3d 1240, 1255 (W.D.
8 Wash. 2014) (citing cases). But Cedar Grove has also alleged the trigger for an IFCA
9 suit—an "unreasonabl[e] deni[al] [of] a claim for coverage or payment of benefits . . ."
10 RCW 48.30.015(1). A refusal to pay a demand for coverage reasonably promptly is an
11 unreasonable denial of benefits, even if only temporary. Because Cedar Grove has
12 alleged at least that much, it has stated an IFCA claim.

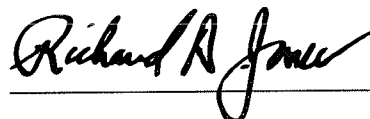
13 Ironshore argues that Cedar Grove lacks standing to invoke IFCA because it is not
14 a "first party claimant to a policy of insurance," as IFCA requires. RCW 48.30.015(1).
15 IFCA's definition of first-party claimant, however, is an "individual, corporation, . . . or
16 other legal entity asserting a right to payment as a covered person under an insurance
17 policy" RCW 48.30.015(4). With respect to at least its demand for defense costs,
18 Cedar Grove is a first-party claimant. At least one of this District's judges has reached a
19 conclusion that Ironshore contends supports its position. *Cox v. Cont'l Cas. Co.*, No.
20 C13-2288MJP, 2014 U.S. Dist. LEXIS 68081, at *15 (W.D. Wash. May 16, 2014),
21 *declined to reconsider* at 2014 U.S. Dist. LEXIS 78457 at *5-8 (W.D. Wash. Jun. 6,
22 2014), *reiterated at King County v. Travelers Indem. Co.*, No. C14-1957MJP, 2015 U.S.
23 Dist. LEXIS 53609, at *3-6 (W.D. Wash. Apr. 23, 2015). In *Cox*, the court decided that a
24 dentist's patients could not, after his assignment of his claims against his insurer to them,
25 invoke IFCA in a suit against the insurance company. 2014 U.S. Dist. LEXIS 68081, at
26 *15 ("The professional liability policy [the dentist] had with [his insurer] is a third-party
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1 policy. Thus, he was never a ‘first party claimant’ under the IFCA and could not assign
2 an IFCA claim to Plaintiffs.”). This court does not reach the same conclusion. IFCA
3 gives a cause of action to a first-party claimant, it does not require that the claimant have
4 a first-party policy. The only additional threshold limitation IFCA imposes is that the
5 “first party claimant” “assert[] a right to payment as a covered person under an insurance
6 policy . . . arising out of the occurrence of the contingency or loss covered by such a
7 policy or contract.” RCW 48.30.015(4). With respect to at least Cedar Grove’s claim for
8 defense costs, it is a claimant asserting a right to a payment arising out of an insured
9 contingency—the filing of a covered lawsuit against it. *Accord City of Bothell v. Berkley*
10 *Regional Specialty Ins. Co.*, No. C14-791RSL, 2014 U.S. Dist. LEXIS 145644, at *28
11 (W.D. Wash. Oct. 10, 2014). The court will not preclude revisiting this issue at the time
12 when the parties can focus on IFCA, as opposed to their struggle to find a single forum
13 for their dispute. For now, the court rules that Cedar Grove is a first-party claimant
14 within the meaning of IFCA, at least as to its claim for an unreasonable denial of
15 payment of its defense costs.

16 III. CONCLUSION

17 For the reasons stated above, the court DENIES Ironshore’s motion to dismiss
18 (Dkt. # 11), directs the clerk to TERMINATE Cedar Grove’s motion for supplemental
19 briefing (Dkt. # 27) because it is moot, and GRANTS Cedar Grove’s motion invoking the
20 first-to-file rule (Dkt. # 35). The parties shall comply with the court’s orders as to Cedar
21 Grove’s amended complaint and a joint statement on the status of the New York action.

22 Dated this 2nd day of June, 2015.

23
24 

25 The Honorable Richard A. Jones
26 United States District Court Judge
27